In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

JOHN A. MALONE and ELEANOR F. DANA,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE ORDER AND JUDGMENT OF THE COURT BELOW.

The order of the Court of Appeals denying leave to file petition for writ of prohibition was made and entered on October 31, 1952. (R. 20.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

The Supreme Court has jurisdiction to review by certiorari the action of a Court of Appeals in denying a petition for writ of prohibition where the writ sought to control the action of the District Court within its circuit and in a case where the District Court was proceeding to act in a criminal case after it had lost all jurisdiction therein. (*McClellan v. Carland,* 217 U.S. 268, 275-277.)

STATEMENT OF THE CASE.

A full statement of the case is set forth in the foregoing petition.

Summarized, the case is as follows:

An indictment having been filed in the United States District Court for the Northern District of California naming petitioners herein as defendants, said defendants appeared in said District Court and filed written motions to set aside said indictment. After argument the Court granted said motions and *dismissed the indictment as to all defendants.* Thereafter the United States moved the Court to set aside said order dismissing said indictment, which motion the Court granted over the objection of defendants that the Court was without jurisdiction to proceed further in the case. Thereafter the District Court insisted that the defendants enter their pleas to said

indictment and threatened to proceed with the trial of said action after the entry of said pleas, all over the objections of said defendants that the Court was without jurisdiction. Application was then made to the Court of Appeals for the Ninth Circuit for a writ of prohibition to enjoin and restrain the District Court from proceeding further in said criminal case. The Court of Appeals denied petitioners leave to file said petition.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court of Appeals erred in denying petitioners' motion for leave to file said petition for a writ of prohibition.

2. The Court of Appeals erred in inferentially holding, by its denial of leave to file said petition, that it had discretion in the matter and that, under the facts stated in the petition, the writ should not issue as a matter of right.

3. The Court of Appeals erred in inferentially holding, by its order denying leave to file said petition, that where a District Court has intentionally dismissed an indictment, not due to any mistake of fact, that such Court could reinvest itself with jurisdiction by setting aside the order dismissing said indictment.

ARGUMENT.

I. SUMMARY OF ARGUMENT.

Upon the authorities hereinafter cited, petitioners argue and contend as follows:

Where a District Court knowingly and intentionally makes an order dismissing an indictment, such Court is thereafter divested of all jurisdiction to proceed further in the case; that when such District Court attempts to exercise further jurisdiction in such a case, the defendant in such action is entitled to have a writ of prohibition issued out of a Court of Appeals as a matter of right. The refusal of the Court of Appeals to allow a petition for writ of prohibition to be filed reciting the foregoing circumstances, is error that can be reviewed by the Supreme Court on certiorari and is in effect a denial of the issuance of the writ of prohibition.

II. WHEN THE ISSUANCE OF A WRIT OF PROHIBITION IS A MATTER OF RIGHT AND NOT OF DISCRETION.

The rule as to when a writ of prohibition will issue as a matter of right has been ofttimes stated by this Court.

> "The settled rules in reference to the writ of prohibition were thus laid down in *Re Rice,* 155 U.S. 396, 402 (39: 198, 201): 'Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy

is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

Ex parte Alix, 166 U.S. 136, 137, 41 L. ed. 948, 949;

Smith v. Whitney, 116 U.S. 167, 173, 29 L. ed. 602, 603;

In Re Rice, 155 U.S. 396, 402, 39 L. ed. 198, 201.

The petition herein discloses that the Court knowingly and intentionally dismissed the indictment and that its action was not induced by any fraud or mistake of fact. The Court thus became divested of all jurisdiction to proceed further in the matter. The motion of the Government for reconsideration of such order of dismissal was a new proceeding at the outset of which petitioners herein objected to the jurisdiction of the Court. Under such circumstances they were entitled to have their petition filed in the Court of Appeals and to have either an order to show cause or alternative writ issued thereon.

III. THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE WRIT.

Title 28 U.S.C., Sec. 1651 confers upon all Courts established by Acts of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdictions. It further provides that an alternative writ or rule *nisi* may be issued by a justice or judge of a Court having such jurisdiction.

The indictment having been properly filed in the District Court for the Northern District of California, appellate jurisdiction over such cause is vested in the Court of Appeals for the Ninth Circuit. (28 U.S.C. Secs. 1291 and 1294.)

Although no appeal has actually been prosecuted from the order of the District Court setting aside its order dismissing the indictment *as no appeal lies from such order,* the matter is still within the appellate jurisdiction of the Court of Appeals and that Court can control the action of the lower Court by any appropriate writ. (*McClellan v. Carland,* 217 U.S. 268, 279, 54 L. Ed. 762, 766.) Under the authority of the last cited case the Supreme Court has jurisdiction to review the action of the Court of Appeals in such matter.

IV. THE DISMISSAL OF THE INDICTMENT BY THE DISTRICT COURT DIVESTED THAT COURT OF ALL JURISDICTION TO PROCEED FURTHER IN THE MATTER.

The effect of granting a motion to dismiss an indictment is to wipe out the indictment and leave the case standing as though no indictment had ever been

filed. The rule is correctly stated in *People v. Grace,* 88 Cal. App. 222, 229, 263 Pac. 306, as follows:

> "The dismissal of the information terminated that proceeding, and so far as the indictment was concerned, effectively disposed of the information as though it had never been filed. When the defendant stood before the court and was arraigned under the indictment, his status was the same as though there never had been an information filed against him, or that he had never been tried under the information, found guilty and the case reversed."

And the same rule will be found set forth in the following cases:

State v. McKinley (Mo.), 111 S.W. (2d) 115, 118;
Pray v. State (Ariz.), 106 Pac. (2d) 500, 502;
State v. Andres (Fla.), 5 So. (2d) 7, 9;
State v. Veterans of Foreign Wars (Ia.), 274 N.W. 916, 112 A.L.R. 383.

In *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849, defendant had been convicted after the Court had amended the indictment by striking out certain portions thereof. The Supreme Court released the defendant on a writ of habeas corpus and in doing so said:

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the of-

fense is gone, and the court has no right to proceed any further in the progress of the case *for want of an indictment.* If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. *The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered.* There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange,* 85 U.S. 18 Wall. 163 (21:872); *Ex parte Parks,* 93 U.S. 18 (23:787); *Ex parte Wilson* (*supra*), and other cases.'"[2]

Thus, in the *Bain* case this Court has held that the dismissal of an indictment has the same effect as the entry of a *nolle prosequi* and that *in each instance the jurisdiction of the Court is terminated.*

The entry of a *nolle prosequi* terminates that particular proceeding.

> "It is not a bar to a second indictment covering the same matter, although it does terminate the proceedings in which the nolle prosequi occurs."
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> *United States v. Fox* (3 Cir.), 130 Fed. (2d) 56, 58;
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> *Zole v. Allen,* 93 Fed. Supp. 95, 97.

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[2]All emphasis appearing in quotations in this brief has been supplied by the writers.

In 22 *C.J.S.*, Sec. 456, page 705, the effect of an entry of *nolle prosequi* is stated as follows:

> "While the entry of nolle prosequi is not a final disposition of the case, and will not bar another prosecution for the same offense, unless it is entered after accused has been put to his trial on a valid indictment before a jury duly sworn and impaneled, see supra §§ 253-255, nevertheless, it is a discharge, and necessarily *is a termination of the particular prosecution. On entry it is a dismissal or nullification of the particular indictment, and renders nugatory any proceedings carried on subsequently under the same indictment. No conviction of accused may be had except by beginning a new case against him. After the entry of a nolle prosequi accused stands uncharged with any crime.*"

In the instant case the District Court having dismissed the indictment after fully considering the matter, the matter stood as if no indictment had ever been filed and there was nothing before the Court on which it could further proceed.

Rule 12(b)(5), Rules of Criminal Procedure, reads in part as follows:

> "If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information."

The foregoing rule is a clear indication that the granting of a motion to dismiss an indictment ter-

minates for all times that particular proceeding, leaving the Government in the position of having to seek a new indictment, or appealing within 30 days from such order. (18 U.S.C. 3731.)

In the instant case the Court made no order directing that petitioners be either held in custody or their bail continued pending the filing of a new indictment.

V. THE CASE OF EX PARTE ALTMAN, 34 FED. SUPP. 106.

The District Judge in his order vacating the order dismissing the indictments held that the Court had power so to do on the authority of the above case. Such case is no authority for the action of respondents.

The *Altman case* involved the removal of Altman from California to Michigan. The facts were that on December 18, 1936 the indictment was returned in the Michigan Court. On January 26, 1937, a little over a month later, the case was set for trial. On the next day, January 27th, the Court made its order dismissing the case for lack of prosecution. On February 17, 1937 the Government moved to set aside the order of January 27th and on April 13, 1939 the Michigan Court set aside said order. It is apparent that the order dismissing the cause was inadvertently made on a mistake of fact. The matter did not, as here, involve the attempt of the trial judge to correct an error of law. However, the District judge in the *Altman case* held as follows: (1) That in the

proceeding before him he had to presum to presume that the
orders made by the Michigan judge were dge were valid; (2)
That Altman was not entitled to any hea any hearing on the
matter before trial. All other language anguage in the Alt-
man decision is mere dicta and in direct va direct variance with
the cases we have heretofore cited in cited in this brief.

The *Altman case* has only been cited on en cited once, in the
case of *United States v. Koen,* 87 Fed. 87 Fed. Supp. 589,
where the District Court in the latter cas latter case construes
the *Altman case* as holding that a Coua at a Court may set
aside an order which was entered due to cd due to clerical mis-
take, that is, where the order as entered w entered was not the
order pronounced or intended by the Co by the Court. With
this rule we have no quarrel.

The District judge in the *Altman case* w *nan case* was in error
in holding that the order of dismissal was nissal was not a final
order. His very reasoning is unsound a unsound as he holds
that no such order is final unless it oper ess it operates as an
acquittal or as a bar to a second prosecu nd prosecution. Such
is not the law. A final order is one which one which terminates
a particular proceeding.

If the dicta in the *Altman case* be sound *se* be sound, then if a
Court granted a judgment of acquittal, acquittal, the judge
could set it aside on motion of the Gove f the Government on
the ground that upon further considerati consideration he felt
the evidence was sufficient to justify a justify a finding of
guilt. Of course, such cannot be the law. e the law.

Once a Court has divested itself of juri self of jurisdiction in
a criminal case, there being no longer a v longer a valid indict-
ment pending before it, the Court has not urt has nothing before
it on which it can act.

The opinion in the *Altman case* clearly shows that the District Judge decided the case on the ground that the order dismissing the cause was made through inadvertence and did not correctly set forth the order which the Court had actually made. (See p. 109.)

In the District Court the Government cited the cases of *United States v. Benz,* 282 U.S. 304; *United States v. Mayer,* 235 U.S. 55 and *Flowers v. United States,* 86 Fed. (2d) 79, in support of its contention that a Court has the power to correct or modify final orders if the motion is made within the same term of Court. However, in each of the cases so relied on by the Government, *there was a valid indictment pending and which had not been dismissed.* The order subsequently amended or corrected related to the judgment.

VI. THE COURT OF APPEALS ERRED IN DENYING LEAVE TO FILE THE PETITION.

Although we have argued above that the writ should have issued as a matter of right on the facts set forth in the petition therefor, leave to file the petition should have been granted for another reason.

Assuming, merely for purposes of argument, that it was within the discretion of the Court of Appeals to allow the petition to be filed, the action of the Court constituted an abuse of such discretion.

The dismissal of the indictment divested the District Court of all jurisdiction and left the matter as if no indictment had ever been filed. The action of

the District Court in setting aside its order dismissing the indictment, insisting on defendants entering pleas to the indictment and proceeding with the trial of the case, would involve great trouble, time and expense to both the Government and the defendants. This should not be allowed to occur. The District Court having no jurisdiction to proceed in the matter, its action should be summarily stopped by a writ of prohibition.

VII. IMPORTANCE OF THE QUESTION INVOLVED AND CONCLUSION.

The questions presented herein are of grave importance. They deal with the power of trial Courts to divest themselves of jurisdiction and then to re-establish such jurisdiction when there is no cause or matter pending before such Court. The questions also deal with the right of citizens to seek the aid of a Court of Appeals when the lower Court is threatening to place them on trial for a serious offense when there is no accusatory pleading before such Court. These matters merit a clear enunciation of principle by the Supreme Court of the United States.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
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